Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1216

THEODORE RISTAINO, *et al.*,

Petitioners,

v.

JAMES ROSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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Petitioners,

v.

JAMES ROSS, JR.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

PRIOR PROCEEDINGS

ROSS was convicted by a trial jury in the Superior Court, Middlesex County, Massachusetts, and there is no opinion with respect to that conviction. The opinion of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Ross* is reported in 1972 Mass. Adv. Sh. 873, 282 N.E. 2d 70. (App. 111) ROSS filed a

timely petition to the United States Supreme Court, Misc. #72-5119, and on January 22, 1973, Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were granted, the judgment below vacated and the case remanded for further consideration in light of *Ham v. South Carolina*, 409 U.S. 524; *Ross v. Massachusetts*, 410 U.S. 901 (1973). (App. 127) Subsequently, a second opinion was rendered affirming ROSS' conviction by the Supreme Judicial Court for the Commonwealth of Massachusetts and is reported in 1973 Mass. Adv. Sh. 839, 296 N.E. 2d 810. (App. 128) ROSS again filed a timely Petition for Writ of Certiorari to the United States Supreme Court, which petition was denied on December 3, 1973, with Mr. Justices Marshall, Douglas and Brennen dissenting, *Ross v. Massachusetts*, 414 U.S. 1080 (1974). (App. 137) ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts. (App. 146) On June 24, 1974, the Honorable Walter Jay Skinner, after a hearing, issued a memorandum and order stating that:

> "The mandate of *Ham* is so clear, however, and the role announced is so fundamental that I have no choice but to enter the following order:
>
> The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above." *Ross v. Ristaino*, 388 F. Supp. 99 at 101 (1974). (App. 151)

The Commonwealth then instituted an appeal of Judge Skinner's memorandum and order to the United States Court of Appeals for the First Circuit. (App.

155) On December 31, 1974 the Court of Appeals issued a decision affirming the granting of ROSS' Petition for Writ of Habeas Corpus and stated:

> "On these facts the District Court was not in error in concluding that '[t]he likelihood of infection of the verdict (by racial, prejudice) was at least as great as it was in *Ham*.' In effect the Court held that a black defendant charged with a violent crime against a white security officer would be likely to be a special target of racial prejudice." *Ristaino v. Ross*, 508 F.2d 754, 756 (1975). (App. 158)

The Commonwealth then filed a Petition for Writ of Certiorari with this Court which was granted on May 27, 1975 along with Respondent's Motion to Proceed In Forma Pauperis. *Ristaino v. Ross*, 95 S. Ct. 1989 (1975). On June 9, 1975, this Court granted Respondent's Motion to Appoint Counsel and Michael G. West, Esquire of Springfield, Massachusetts was appointed to represent James Ross, Jr. *Ristaino v. Ross*, 43 L.W. 3644 (June 10, 1975).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit Court of Appeals erred in Applying *Ham v. South Carolina*, 409 U.S. 524 (1973) to the facts as presented in *Ristaino v. Ross*, 508 F.2d 754 (1974).

2. Whether the failure to comply with the requirements of *Ham v. South Carolina*, 409 U.S. 524 (1973) constitutes reversible error without the showing of actual prejudice.

3. Whether the First Circuit Court of Appeals erred in its retroactive application of *Ham v. South Carolina*, 409 U.S. 524 (1973) to the case at bar.

STATEMENT OF THE CASE

Respondent, JAMES ROSS, JR., was convicted on three indictments (App. pp. 19, 20, 21) charging him with armed robbery, assault and battery by means of a dangerous weapon; and assault and battery with intent to murder. As a result of these convictions, ROSS received terms of 18 to 20 years for armed robbery (App. 6) 6 to 10 years for assault with a dangerous weapon (App. 17) and 18 to 20 years for assault and

battery with intent to murder (App. 12) to be served concurrently at a Massachusetts Correctional Institution.

Before trial, and prior to the impanelling of the jury, each defense counsel submitted motions to the judge which proposed questions to be asked to the prospective jurors concerning the issue of racial prejudice. (App. pp. 22-23, 24-25, 25-28).

Among those questions submitted to the judge concerning racial prejudice were the following:

Submitted by Counsel for Respondent Ross.

"5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" (App. 23)

Submitted by Counsel for Co-defendant Roy Daniels.

"3. Do you believe that blacks have a greater propensity for violent or militant behavior than whites?

"4. Over the past years have you noticed a change in the number of crimes being committed in this city?

"6. Has it disturbed you?

"7. Do you feel this increase is due primarily to blacks in the city?

"8. Have you noticed an increased number of blacks and Puerto Ricans coming into your neighborhood?

"9. Have you been disturbed by the changes in your neighborhood?

"10. Have you thought of moving out of it?" (App. 24)

Submitted by Counsel for Co-defendant James Williams.

"10. Would the fact that the defendant is black make it more difficult for you to render a verdict in his favor than if he were white?

"11. If it develops in this case that testimony of black witnesses contradicts the testimony of white witnesses, other things being equal, would you give the testimony of black witnesses and white witnesses equal credit?

"12. Do you have any feelings of prejudices against organizations which support civil rights for members of the black race, such as the National Association for the Advancement of Colored People (NAACP) or the Congress for Racial Equality (CORE) or the Black Panther Party? (App. 26)

"13. Have demonstrations and other activities by blacks in various parts of the United States over the past few years left you with a feeling of hostility toward blacks?

"14. Have you felt in your own mind that black leaders are 'going too far' in their struggle for equal rights? (App. A p. 55)

"15. Have you had an experience involving a black person which left you with a feeling of prejudice concerning members of the black race?

"16. Would the fact that the defendant is a member of a minority make it more difficult for you to consider the facts objectively and render a verdict in his favor than if he were not a member of such group?

"17. Are there any members of this jury who possess any prejudices with respect to the nationality of any one of the defendants which would prevent you from deciding this case solely on the evidence produced at the trial?

"18. Do you have any feelings either for or against persons of the black race who wear the Afro style haircut and long sideburns?

"19. Are there any members of this jury who possess any prejudice with respect to black people who are involved in causes seeking liberation and justice for black people which would prevent you from deciding this case solely on the evidence produced at the trial?" (App. 27)

These motions were made and denied (App. pp. 23, 25, 28). The reason for the judge's refusal to ask any of the proposed questions is contained in the following colloquy:

THE COURT: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.

There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.

Is there anything peculiar about it, Mr. Donnelly?

MR. DONNELLY:[1] No, just the fact that the victim is white, and the defendants are black.

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[1] Mr. Donnelly was counsel for Roy Daniels; Mr. Owens was counsel for James Williams and Mr. Newman was counsel for James Ross, Jr.

THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them—this Judge anyway—and I am sure all Judges of this Court—would take the time to impress upon them before, during and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

I believe that that is the best that can be done with respect to the problems which—as I said, I regard as extremely important, but at the same time, my attitude—

MR. DONNELLY: There is only one thing. The only reference I would make to the facts in this case—the victim being white, and that he was a security guard in uniform and acting as a policeman.

* * *

MR. OWENS: In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial—

THE COURT: Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair

administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it.

MR. OWENS: Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced.

THE COURT: I am astonished at that. It is contrary to all of the experience that I have had.

MR. DONNELLY: I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' they will say they can be. The thrust of these questions is designed to help the jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves. (App. pp. 29-31).

Instead of asking any of the proposed questions or any other question of the court's choosing as to racial prejudice the court addressed the following questions to the jurors as required, at that time, by Massachusetts General Laws, Chapter 234, Section 28:

> "If any of you are related to the defendant or the victim?
>
> "If you have any interest in this case?
>
> "If you have expressed or formed an opinion or are sensible of any bias or prejudice?"

In addition, the court asked two additional questions; one dealing with whether the jurors or their relations had done police work[2] and the other dealing with whether the jurors would be seriously inconvenienced if they were sequestered for the duration of the trial.

Prospective jurors were excused by the court because of their answers to these questions.[3] At the close of the impanelling of the jury, ROSS, as well as the other two co-defendants, had exhausted their peremptory challenges whereas the Commonwealth had thirty-one peremptory challenges left. (App. 102, *Commonwealth v. Ross*, App. 128-136 AT 134N.9).

Moreover, prior to the time the prospective jurors were asked the above-mentioned questions the trial judge discussed with each prospective jury panel their obligation to render a fair and impartial verdict based only on the evidence. However, not once during the trial judge's lengthy soliloquy to each panel of prospective jurors did he directly confront the issue of racial prejudice. Rather, he spoke in general terms appealing to the prospective jurors' "intellect and conscience" (App. 37).

ROSS' final deliberating jury contained ten (10) whites and two (2) blacks (*Commonwealth v. Ross*, App. pp. 128-136 AT 134). On appeal, ROSS assigned

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[2]Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?" (App. 38).

[3]Seventeen jurors were excused; two because of admitted prejudice (App. pp. 42, 55) and fifteen because they had already formed an opinion. (App. pp. 40, 59, 65, 75, 76, 77, 77, 86, 87, 87,89,97,98, 98, 99-100).

as error the refusal of the trial judge to examine the jurors with respect to racial prejudice and argued that such refusal violated his right to a fair and impartial jury. (App. 105) The Supreme Judicial Court affirmed ROSS' conviction. Petitioner then filed a timely Petition for a Writ of Certiorari to this Court which was granted, judgment vacated and case remanded for further consideration in light of *Ham v. South Carolina*. After rehearing the Supreme Judicial Court again affirmed ROSS' conviction. ROSS again filed a timely Petition for a Writ of Certiorari to the United States Supreme Court which petition was denied on December 3, 1973, in which three Justices in a lengthy opinion dissented. (App. pp. 137-142). ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts which petition was conditionally granted on June 24, 1974, (App. pp. 151-154). An appeal by the Commonwealth of Massachusetts was taken from the conditional granting of ROSS' Petition for Writ of Habeas Corpus to the United States Court of Appeals for the First Circuit which affirmed the granting of ROSS' Petition. *Ristaino v. Ross*, 508 F.2d 754 (App. pp. 158-173). The Commonwealth then filed a Petition for Writ of Certiorari to this Court which was granted, on May 27, 1975, together with Respondent's Motion to Proceed In Forma Pauperis. *Ristaino v. Ross*, 95 S. Ct. 1989 (1975).

SUMMARY OF ARGUMENT

I. The judgment of the First Circuit in *Ross* is in conformity with this Court's decision in *Ham v. South*

Carolina, 409 U.S. 524 (1973). The "special target" doctrine of the Supreme Judicial Court for the Commonwealth of Massachusetts does not face the reality of our times and places an undue burden on the defendant to show that he is such a "special target." The doctrine advanced by the Supreme Judicial Court for the Commonwealth of Massachusetts is also unsupported by this Court's decision in *Aldridge v. U.S.*, 238 U.S. 308 (1931), and *Ham*, as well as the numerous cases upon which this Court relied in deciding *Aldridge* and *Ham*.

Moreover, since *Ham* was decided, all Courts save three have held that failure to propound questions to prospective jurors as to racial prejudice, when requested to do so by a black criminal defendant, is a violation of Constitutional dimensions. Respondent also asserts that no conflict exists between any of the Circuit Courts of Appeals which have thus far decided the issue.

II. The failure of the trial judge to examine the prospective jurors as to racial prejudice in the case at bar is reversible error without the need to show actual prejudice.

The Commonwealth of Massachusetts may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The rule of *Ham* is basic to a fair and impartial trial, and therefore a fundamental requirement of due process.

III. The First Circuit In *Ross* Did Not Err In Holding That *Ham v. South Carolina*, 409 U.S. 524 (1973), Is To Be Given Retroactive Effect.

A. Ample support for the inference that this Court implicitly decided that *Ham* applied to the case at bar when it summarily vacated the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts and remanded the case to that Court for reconsideration in light of *Ham*, is found in the cases of *Fuller v. Alaska*, 393 U.S. 80 (1968), *Desist v. U.S.*, 394 U.S. 244 (1969), and *Tehan v. U.S. ex rel Shott*, 382 U.S. 406 (1966).

B. For retroactivity purposes, in applying the three prong test of *Stovall v. Denno*, 388 U.S. 293 (1967), foremost among the factors is the purpose of the new Constitutional rule. The major purpose of the rule of *Ham* is to overcome an aspect of the criminal trial that substantially impairs its truth finding function, therefore *Ham* should be accorded retroactive effect. Furthermore, *Daniel v. Louisiana*, 420 U.S. 31 (1975), and *DeStefano v. Woods*, 392 U.S. 631 (1968) are distinguishable from the case at bar and should not be controlling. In both *Daniel* and *DeStefano*, problems of justified reliance by state officials on past decisions of this Court, and the significant effect upon the administration of justice, warranted against their retroactive application. Such problems are not present in the case at bar.

C. The First Circuit's retroactive application of *Ham* should not be limited to cases still pending on "direct review." Any distinction for retroactivity purposes between cases on "direct review" and those on "collateral attack" is arbitrary and unreasonable, supported by neither law nor logic.

Moreover, the value of finality in criminal judgments does not outweigh the interest of each prisoner in the vindication of his constitutional rights.

IV. Even if *Ham v. South Carolina*, 409 U.S. 524 (1973) did not enunciate a new constitutional rule of universal applicability, this Court should now announce such a rule in *Ross*.

ARGUMENT

I.

THE JUDGMENT OF THE COURT BELOW UPHOLDING RESPONDENT ROSS' RIGHT TO HAVE THE TRIAL JUDGE EXAMINE PROSPECTIVE JURORS WITH RESPECT TO RACIAL PREJUDICE IS IN CONFORMITY WITH THIS COURT'S DECISION IN *HAM V. SOUTH CAROLINA*, 409 U.S. 524 (1973).

On December 31, 1974, the United States Court of Appeals for the First Circuit affirmed a decision of the United States District Court for the District of Massachusetts granting ROSS' Petition for Writ of Habeas Corpus and declaring that the trial judge's failure to specifically inquire of the prospective jurors as to racial prejudice rises to a level of a constitutional violation requiring ROSS' release or retrial. The First Circuit appears to limit its decision to situations which involve a black criminal defendant charged with a violent crime. They state:

> "On these facts the District Court was not in error in concluding that '[t]he likelihood of infection of the verdict (by racial prejudice) was at least as great as it was in *Ham*. In effect the court held that a black defendant charged with violent crimes would be likely to be a special target of racial prejudice." (App. pp. 158-171 AT 162).

On June 24, 1974, the Honorable Walter Jay Skinner, Judge for the United States District Court for the District of Massachusetts, issued a memorandum and order granting ROSS' Petition for Writ of Habeas Corpus based upon the fact that the trial judge erred in not specifically calling to the attention of the prospective jurors the issue of racial prejudice (App. pp. 151-154 AT 153). Judge Skinner's ruling was made despite the otherwise exemplary conduct of the trial judge and despite the respect which the federal courts owe to decisions of the highest court of a state. He said with regard to *Ham v. South Carolina* that its true significance is to extend the rule in *Aldridge* to state court trials (App. pp. 151-154 AT 153). However, in addition to Judge Skinner concurring with Justices Marshall, Douglas and Brennen that the facts in *Ross* are "strikingly similar" to those of *Aldridge v. United States*, 283 U.S. 308 (1931) he said in rendering his opinion in favor of ROSS that:

> "The mandate of *Ham* is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order." (App. pp. 151-154 AT 154).

On January 17, 1973, this Court decided the case of *Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L.Ed.2d 46 (1973). This Court held pursuant to the Due Process Clause of the Fourteenth Amendment, that a black defendant in a state court criminal proceeding is entitled to have the trial judge make inquiry of the prospective jurors as to racial prejudice. Not to do so is a reversible error. 409 U.S. 524, 93 S. Ct. 848, 850 35 L.Ed.2d 46 (1973).

The Supreme Judicial Court for the Commonwealth of Massachusetts in its decision in *Commonwealth v. Ross,* 1973 Adv. Sh. 839, 296 N.E.2d 810 upheld the trial judge's refusal to ask the following question to the prospective jurors which was submitted by counsel for Respondent ROSS:

> "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Supreme Judicial Court upheld the trial judge's refusal since it believed that *Ham* was to be limited to its facts and that unless ROSS could show that the was a "special target for racial prejudice," the trial judge was not constitutionally required by *Ham* to specifically interrogate the prospective jurors as to racial prejudice.[4]

It is Respondent ROSS' assertion that the Supreme Judicial Court erred in its interpretation of the decision in *Ham v. South Carolina* as well as its affirmation of his conviction and that this Court should affirm the decision of the First Circuit Court of Appeals.

The United States Supreme Court in its decision in *Ham v. South Carolina, supra,* stated that the constitutional stature of the inquiry into racial prejudice is derived from:

> "... the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied and from the principal purpose as well as from the language of those who adopted the Fourteenth Amendment."[5]

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[4] 1973 Adv. Sh. 839, ____ 296 N.E. 2d 810, 816.

[5] 409 U.S. 524, ____, 93 S.Ct. 848, 851, 35 L.Ed. 46, ____. See also *Ross v. Ristaino et al* (App. pp. 151-154 AT 152).

The opinion, written by Mr. Justice Rehnquist, for the unanimous Court in *Ham* clearly indicates that the rationale for its decision was based upon the purpose and foundation of the Fourteenth Amendment which was to stop invidious discrimination based on racial prejudice.[6] Because of the historical basis of the Fourteenth Amendment to eliminate racial prejudice this Court has recognized that racial prejudice is a paramount factor to be taken into account in criminal proceedings. Nothing in the *Ham* opinion or the opinions of the district and circuit courts and nothing in the Fourteenth Amendment supports the conclusion that protection is to be limited to "special targets for racial prejudice." The report of the National Advisory Commission on Civil Disorders (1968) commonly referred to as the Kerner Commission Report recognizes the prevalence of racism in our society when it states:

> "Race prejudice has shaped our history decisively in the past; it now threatens to do so again. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II." (Page 91)

No one can doubt the validity of this statement. In fact, Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennen joined, dissenting in the denial of the Second Petition of Certiorari filed by ROSS states:

> "Finally, to say that petitioner is not a potential target of racial prejudice would be to ignore as judge what we must all know as men. That petitioner was tried in Boston, Massachusetts,

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[6] ID at 850.

while Gene Ham was tried in Florence, South Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South." (App. pp. 137-142 AT 142).

ROSS asserts that to limit the voir dire as to racial prejudice only to "special circumstances"[7] where the defendant is found to be a "special target" for racial prejudice is not to face the reality of our times and in addition to place an undue burden on the defendant to show that he is such a "special target."

As previously mentioned, the decision in *Ham* relied on "the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied". *Aldridge v. United States*, 238 U.S. 308 (1931), concerned a Negro criminal defendant who was alleged to have murdered a white policeman. *Aldridge* did not deal with a black defendant who was a "special target" for racial prejudice and no other factors were shown to be present when the United States Supreme Court reversed his conviction. In fact, Mr. Justice Marshall states:

> "The *Aldridge* Court was not concerned with whether petitioner was unpopular in the community, a special target of prejudice—but rather with the potential racial 'bias of the particular jurors who are to try the accused.' 283 U.S., at 314. The Court did not rely on any particular circumstances to justify its requirements other than the fact that 'the possibility of prejudice (against Negroes) is (not) so remote as to justify

[7] 1973 Adv. Sh. 839, 296 N.E. 2d 810, 816.

> the risk in forbidding the inquiry.' Ibid. Nor did the Court purport to limit its holding to any region because the 'question is not . . . the dominant sentiment of the community . . .' Ibid. 'In *Ham*, this Court reaffirmed its commitment to the holding of Aldridge and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice—the principal target of the Fourteenth Amendment.' " (App. pp. 137-142 AT 140).

In *Aldridge* numerous cases are cited which this Court in *Ham* cites with approval in which there were no special circumstances, other than the fact that the defendant was a Negro, to require reversal of the defendant's conviction due to the failure of the trial judge to inquire about any racial prejudice the prospective jurors might entertain.

Pinder v. State, 27 Fla. 370, 8 So. 837 (1891) was a case where the defendant, a Negro, was accused of murder. The lower Circuit Court refused to propound the following question to the prospective jurors:

> "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?"

The Supreme Court of Florida held it was reversible error not to ask the above question. This case presents no special circumstances other than the fact that the defendant was a Negro.

In *Hill v. State*, 112 Miss. 260, 72 So. 1003 (1916) where the accused, a Negro, was charged with murder of another Negro, all witnesses except one was Negro. Counsel for the defendant propounded the following

question to a prospective juror which the lower Court held to be incompetent:

> "Mr. Dillard, have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?"

The Supreme Court of Mississippi reversed the appellant's conviction and stated:

> ". . . how else could appellant have guarded against race prejudice figuring in the determination of his trial than by subjecting the jurors on their voir dire examination to a line of questioning such as was presented to the Court in this instance. It is only by asking questions of the nature of the above question that it is possible for counsel to elicit from the venireman whether or not there exists in his breast race prejudice, perhaps calculated to do the defendant irreparable injury in the trial of his case", 112 Miss. 260, 265.

In *State v. McAfee*, 64 N.C. 339 (1869) the Supreme Court of North Carolina reversed the rape conviction of a colored man because of the refusal of the trial judge to ask the prospective jurors if:

> ". . . he believed he could, as a juror, do equal and impartial justice between the State and a colored man".

No special circumstances were present in this case to influence the North Carolina Court to reverse Mr. McAfee's conviction other than the fact that the defendant was a colored man.

It is clear from this Court's decisions in *Aldridge* and *Ham* and the numerous cases upon which it relied in making its decision, that the " special target" doctrine

advanced by the Supreme Judicial Court for the Commonwealth of Massachusetts, in the case at bar, finds no support. In fact Mr. Justice Marshall speaking for himself and Mr. Justice Douglas and Mr. Brennen, dissenting from the Court's denial of ROSS' Petition for Certiorari states in regard to the Supreme Judicial Court's decision that *Ham* was to be limited to those defendants who were a "special target for racial prejudice" that:

> "This distinction is supported by neither logic nor precedent." (App. pp. 137-142 AT 139)

This Court in *Ham* has stated that in addition to the general question required by statute to be put to the prospective jurors an additional question or questions must be put to the veniremen,

> "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain."[8]

Respondent ROSS asserts that the trial judge in the case at bar did not "focus the attention" of the veniremen as to the issue of racial prejudice. ROSS admits the trial judge was concerned about the issue of racial prejudice and regarded it as an important one. Respondent further admits that the trial judge did speak at length to each panel of prospective jurors about their duty and obligation to render a fair and impartial verdict. However, not once during the trial judge's soliloquy to the veniremen did he directly confront the issue of racial prejudice.

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[8] 409 U.S. 524, ____, 93 S.Ct. 848, 35 L.Ed. 2d 46, ____ (1973).

It is ROSS' contention that the only way to "focus the attention of the prospective jurors as to any racial prejudice they might entertain" is to ask specific questions regarding racial prejudice. The First Circuit, in the case at bar, supports ROSS' assertion. (App. pp. 158-171 AT 163) Additionally, Judge Skinner of the United States District Court for the District of Massachusetts recognized this fact when in his opinion in *Ross* he quotes from the case of *People v. Reyes.*, 5 Cal. 347, 349 which is cited by Chief Justice Hughes in *Aldridge* and concludes:

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not unless questions similar to the foregoing are propounded to him." (App. pp. 151-154 AT 153).

Moreover, the Seventh Circuit in *United States v. Dellinger*, 472 F.2d 340, 367 (1972) spoke to this point by stating:

> "The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices."

It is the essence of fundamental fairness and right to an impartial jury which has led this Court to pronounce that it is imperative to allow the specific question regarding racial prejudice or bias to be asked on voir

dire examination.[9]

This Court in *Swain v. Alabama* notes that the influence of race on jurors is widely explored during voir dire and "that the fairness of trial by jury requires no less." 380 U.S. 202 AT 221 (1965).

> "Merely going through the form of obtaining juror's assurances of impartiality is insufficient . . . (w)hether a juror *can* render a verdict based solely on evidence adduced in the courtroom *should not be adjudged on that juror's own assessment of self-righteousness without something more.*" (Emphasis in original.)[10]

Calling for purely subjective responses to general questions is ineffective to test impartiality, and "the defendant in a criminal case has the 'right to probe for the hidden prejudices of jurors.' "[11]

However, the trial judge in the instant case instead of asking any of the defendants' proposed questions as to racial prejudice inquired in a general manner as to bias and prejudice, appealing solely to the jurors' "intellect and conscience" (App. 37). It is obvious that the

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[9] *Aldridge v. United States*, 283 U.S. 308 (1931); *Swain v. Alabama*, 380 U.S. 202 (1965); *Dennis v. United States*, 339 U.S. 162 (1950).

[10] *Silverthorne v. United States*, 400 F.2d 627, 638-639 (9th Cir. 1968); *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971).

[11] *Silverthorne v. United States* ID, at 640; See ABA Project on Standards For Criminal Justice, Fair Trial and Free Press, § 2.3, 126-127 (approved draft 1968); See also W. Forsyth, Trial By Jury 175 (1852); Devlin, Trial By Jury 30-31 (1956). Note, Community Hostility and The Right to Impartial Jury, 60 Colum. L. Rev. 349, 354 (1960).

questions actually asked by the court were ineffective in uncovering the possibility of racial prejudice. In fact, of all the prospective jurors questioned only two were excused because of admitted prejudice (App. 42, 55).

Federal Courts have consistently held that a criminal defendant has a right to examine jurors specifically with respect to racial prejudice,[12] and such questions have been widely approved by state courts.[13]

Since *Ham* was decided on January 17, 1973, all Courts[14] save three[15] have held that failure to propound

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[12]*United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *King v. United States*, 362 F.2d 968 (D.C. Cir. 1966); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959); *Smith v. United States*, 262 F.2d 50 (4th Cir. 1959); *United States v. Dennis*, 183 F.2d 201, 227, n.35 (2d Cir.), aff'd 341 U.S. 494 (1951); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).

[13]*Gholston v. State*, 221 Ala. 556, 130 So. 69 (1930); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Pinder v. State*, 27, Fla. 370, 8 So. 837 (1891); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934); *State v. Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1930); *State v. Pyle*, 343 Mo. 876, 123 S.W. 2d 166 (1938); *Johnson v. State*, 88 Neb. 565, 130 N.W. 282 (1911).

[14]See *Ristaino v. Ross*, 508 F.2d 754 (1st Cir. 1974); *United States v. Robinson*, 485 F.2d 1157 (3rd Cir. 1973); *Featherston v. United States*, 491 F.2d 96 (5th Cir. 1974) cert. den. 417 U.S. 971 (1974); *United States v. Ross*, 477 F.2d 551 (6th Cir. 1973); *United States v. Powers*, 482 F.2d 941 (8th Cir. 1973) cert. den 415 U.S. 923 (1974); *United States v. Booker*, 480 F.2d 1310 (7th Cir. 1973); *United States v. Robinson*, et al, 475 F.2d 376, AT 381 (D.C. Cir. 1973).

[15]See *United States v. Walker*, 491 F.2d 236 (9th Cir. 1974), *cert. den.* 416 U.S. 990 (1974) discussed in detail *infra; Commonwealth v. Brown*, 228 Pa. Super. 166, 323 A.2d 281 (1974); *Commonwealth v. Lumley*, 1975 Adv. Sh. 751 (Supreme Judicial Court, Massachusetts, April 7, 1975).

questions to prospective jurors as to racial prejudice, when requested to do so by a black criminal defendant, is a violation of constitutional dimensions. Of these three courts only one United States Court of Appeals has held that *Ham* is to be limited to its facts and requires a prior showing that the defendant is a "special target for racial prejudice" before a constitutional right is involved. However, this case, *United States v. Walker*, 491 F.2d 236 (9th Cir. 1974) *cert. den.* 416 U.S. 990 (1974) is distinguishable from the case at bar in several material respects:

> *FIRST, Walker* dealt with the crime of uttering a forged check whereas *Ross* dealt with the assault by a black man against a white quasi police officer which fact ROSS asserts makes his case, per se, one with racial overtones. It is important to note that the First Circuit in the case at bar limited its holding to violent crimes and did not render any opinion as to crimes such as that involved in *Walker*.[16]
>
> *SECOND*, the Court in *Walker* states that its facts are distinguishable from both *Aldridge* and *Ham*, whereas the facts in *Ross* are "strikingly similar" to those in *Aldridge* (See App. pp. 151-154 AT 154 and App. pp. 137-142 AT 142).
>
> *THIRD*, in reaching its conclusion the *Walker* Court relied heavily on the Supreme Judicial Court's decision in *Commonwealth v. Ross*, 296 N.E. 2d. 810 (1973), whereas that decision has been overruled by both the Honorable Walter Jay Skinner (App. pp. 151-154) and the United States Court of Appeals for the First Circuit (Petitioners pp. pp. 158-171) which decisions the *Walker* Court did not have the benefit of in making its decision.

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[16]*Ristaino v. Ross*, 508 F.2d 754, AT 756 (1st Cir. 1974).

FOURTH, in *Walker* the Court agrees that asking prospective jurors questions as to racial prejudice would be preferable but holds that asking these questions did not rise to the level of an abuse of discretion *particularly* "in view of the fact that no objection was made to the Court's failure to ask the questions" (491 F.2d. 236, 239). Whereas ROSS strenuously objected to the trial judge's failure to ask his propounded questions or those of his co-defendants and the trial judge noted ROSS' exception to his failure to do so.

The case of *United States v. Walker* is clearly distinguishable from *Ross* and should not be controlling on this Court's decision. In fact, Respondent asserts that *Walker* is consistent with First Circuit's decision and, therefore, no conflict exists between any of the Circuit Courts of Appeal which have thus far decided this issue.

II.

FAILURE OF THE TRIAL JUDGE TO EXAMINE THE PROSPECTIVE JURORS REGARDING RACIAL PREJUDICE IS REVERSIBLE ERROR WITHOUT THE NEED TO SHOW ACTUAL PREJUDICE.

Petitioners assert that this Court should reestablish a judicial balance between federal and state courts by requiring a showing of real prejudice before the federal court may intervene. (See Brief for Petitioners at 29, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).) Respondent disagrees. In *Snyder*, the Court was concerned with whether the bare viewing of the

scene of the crime by the jurors in the absence of the accused was a denial of due process. The Court based its decision upon the fact that

> "Nowhere in the decision of this Court is there a dictum, and still less a ruling that the 14th amendment assures the privilege of presence when presence would be *useless*, or the *benefit but a shadow*" *Snyder, supra*, at 106. (Emphasis Added)

Far from being useless, and the benefit but a shadow,

> "Petitioners acknowledge that allowing a black defendant to ask questions directed to racial prejudice of the prospective jurors may aid in determining the impartiality of the fact finders." (See Brief for Petitioners at 34.)

Therefore, the considerations which controlled the Court's decision in *Snyder* are inapposite to the case at bar. Furthermore, in *Snyder*, this Court was careful to point out that

> "the Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless* in doing so it offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Snyder, supra*, at 105 (Emphasis Added).

Respondent suggests that the rule of *Ham* is so basic to a fair trial that its infraction is reversible error without the need to show actual prejudice, and may not be treated as harmless error. Cf. *Payne v. State of Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Tumey v. State of Ohio*, 273 U.S. 510 (1926) (impartial judge).

This Court has in the past held that

> "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.". *Chapman v. State of California*, 386 U.S. 18, 24 (1967).

The burden of proof is on the Commonwealth to affirmatively show that any error was harmless beyond a reasonable doubt. See *Commonwealth v. MacDonald*, Mass. Adv. Sh. (1975), 2390, 2395, *Commonwealth v. Robichaud*, 358 Mass. 300, 302 (1970).

This Court in the case of *Peters v. Kiff*, 407 U.S. 493 (1972) has expressed in clear terms that:

> "A fair trial in a fair tribunal is a basic requirement of due process." (Citing *In re Murchison*). (AT 501)

While the *Kiff* decision dealt primarily with the systematic exclusion of blacks from the jury, and raised issues of due process and equal protection, the underlying implication and major thrust of the resolution of the problem was that the right to trial by an impartial jury requires that the jury be selected and comprised of jurors who are capable of rendering a verdict based on the evidence, unfettered by any possible prejudice or bias. This Court emphasized on page 501 that:

> "Long before this Court held that the Constitution imposes the requirement of jury trial on the states, it is well established that the due process clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." and also that:
>
> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (AT 502)

There is no doubt that the possibility of jurors being racially prejudiced existed and therefore would play a significant role in the disposition of the case at bar. In fact, one prospective juror in the *Ross* case admitted prejudice against the defendants because of their race and another juror admitted prejudice (unspecified) against the defendants and were excused (App. 151).

In the case of *United States v. Carter*,[17] 440 F.2d 1132 (1971), the Sixth Circuit dealt with the exact issue as was presented in *Aldridge* and in the present case. In holding that the trial judge committed reversible error by refusing to permit Appellant's counsel to inquire on voir dire examination whether any of the prospective jurors were prejudiced against black people, the court referred to the language of *Aldridge* and stated:

> "The argument is advanced on behalf of the government that it would be detrimental to the administration of law in the Courts of the U.S. to allow questions to jurors as to racial or religious prejudices. We think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualifications were barred. No surer way could be devised to bring the process of justice into disrepute." (at 1133 citing *Aldridge v. United States* 283 U.S. 308 AT 313)

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[17]In *United States v. Carter*, 10 of 12 jurors were white as in the present case.

It is up to the trial judge to assure that no prejudice has been fostered. In order to assure the impartiality of the jury, it has been widely held that the trial judge *must* allow probing questions to jurors on voir dire as to the harboring of a racial bias. The main point is that "the denial or impairment of the right to challenge the jury has been described as *'reversible error without a showing of prejudice'* "[18] (Emphasis Supplied). It should be noted that cases which have construed this particular issue have consistently held that such error is reversible, for the question is one of denying the Respondent his constitutionally guaranteed right to an impartial jury.[19] Furthermore, in the *Kiff* case this Court states:

[18]*Swain v. Alabama*, 380 U.S. 202, 219 (1965). See also *U.S. v. Booker*, 480 F.2d 1310, (7th Cir. 1973).

[19]*U.S. v. Booker*, 480 F.2d 1310, (7th Cir. 1973); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). *United States v. Dennis*, 183 F.2d 201, 227 N.35 (2nd Cir.) aff'd. 341 U.S. 494 (1951); *Bailey v. United States*, 53 F.2d 982 (5th Cir. 1931); *Smith v. United States*, 262 F.2d 50 (4th Cir. 1958); *King v. United States*, 362 F.2d 968 (1966); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968); *United States v. Carter*, 440 F.2d 1132 (6th Cir. 1971); *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *Frasier v. United States*, 267 F.2d 62 (1st Cir. 1959); *Kiernan v. Van Schaik*, 347 F.2d 775 (3rd Cir. 1965); *Spells v. United States*, 263 F.2d 609 (5th Cir. 1959); *Brown v. United States*, 338 F.2d 543 (1964); *Gholston v. State*, 221 Ala. 556, 130 So. 69 (1930); *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Pinder v. State*, 27 Fla. 370, 8 So. 137 (1891); *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934); *State v. Jones*, 175 La. 1014, 144 So. 899 (1932); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1930); *State v. Pyle*, 343 Mo. 876, 123 S.W. 2d 166 (1938) *Johnson v. State*, 88 Neb. 565, 130 N.W. 282 (1911); *People v. Decker*, 157 N.Y. 186, 51 N.E. 1018 (1898); *State v. McAfee*, 64 N.C. 339 (1869); *Fendrick v. State*, 39 Tex. Cr. 147, 45 S.W. 589 (1898).

> "Moreover, even if there is no showing of actual bias in the tribunal, this court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." (AT 502)

In essence, it has been impressed upon our judicial system that "circumstances that create the likelihood or appearance of bias" must be dealt with in such a manner as to give assurances to a criminal defendant placed in this precarious position that due process of law via his right to an impartial jury will be preserved at every stage of the proceedings. The impartiality and integrity of the jury system, the cornerstone of our judicial system, and the defendant's last sanctuary has been subverted in the case at bar.

III.

THE FIRST CIRCUIT IN *ROSS* DID NOT ERR IN HOLDING THAT *HAM V. SOUTH CAROLINA*, 409 U.S. 524 (1973) IS TO BE GIVEN RETROACTIVE EFFECT.

A. This Court Implicitly Decided That *Ham* Applied To The Case At Bar When It Summarily Vacated The Judgment Of The Supreme Judicial Court For The Commonwealth Of Massachusetts And Remanded The Case To That Court For Reconsideration In Light Of *Ham*.

The First Circuit Court of Appeals in deciding *Ristaino v. Ross* stated:

> "Our dissenting brother suggests that the rule of *Ham* should only apply to cases brought to trial

after the date *Ham* was decided. However, we do not feel the Writ should be denied on the ground that *Ham* should not be given retroactive application. The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that Court for reconsideration in light of *Ham*. See *Ross v. Massachusetts*, 410 U.S. 901 (1973)"

The Commonwealth in its Brief, at page 30, suggests that there is no support for this inference drawn by the First Circuit. Respondent suggests that ample support for this inference is contained in the cases of *Fuller v. Alaska*, 393 U.S. 80 (1968), *Desist v. U.S.*, 394 U.S. 244 (1969), and *Tehan v. U.S. ex rel Shott*, 382 U.S. 406 (1966).

In *Fuller, supra*, the issue before this Court on certiorari was whether *Lee v. Florida*, 392 U.S. 378 (overruling *Schwartz v. Texas*) should be retroactively applied so as to require reversal of a state criminal trial conviction based upon the admission of evidence violative of Section 605 of the Federal Communications Act. This Court affirmed by stating:

"Retroactive application of *Lee* would overturn every state conviction obtained in good faith reliance on *Schwartz*. Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." 393 U.S. 80, at 80-81.

Certainly, as in *Fuller*, this Court had every opportunity when *Ross* first presented his Petition for

Writ of Certiorari to grant his Petition and affirm his conviction by stating that *Ham v. South Carolina* was not to be given retroactive effect.

In *Desist v. U.S., supra*, Petitioner's Federal conviction for conspiracy to import and conceal heroin was affirmed by the Court of Appeals, and later by this Court. Certiorari was granted in *Desist*, and this Court held that *Katz v. U.S.*, 389 U.S. 347 (1967), was to be applied prospectively.

In *Tehan v. U.S. ex rel Shott, supra*, holding *Griffen v. California*, 380 U.S. 609 (1965), retroactive to all cases pending on direct review, Mr. Justice Stewart, writing for this Court stated at page 409:

"As in *Linkletter*, the question in the present case is not one of 'pure prospectivity.' The rule announced in *Griffen* was applied to reverse Griffen's conviction . . . Nor is there any question of the applicability of the *Griffen* rule to cases still pending on direct review at the time it was announced. Cf. *O'Connor v. Ohio*, 382 U.S. 286 (1965)."

Ross is indistinguishable from *O'Connor, supra*, the case which Mr. Justice Stewart stated implicitly decided the question of the application of *Griffen* to cases on direct review. In both *Ross* and *O'Connor*, the cases were still pending on direct review at the time the new case was announced, certiorari was granted, and judgment was vacated and remanded to the state's highest court in light of the new decision.

B. Where The Major Purpose Of New Constitutional Doctrine Is To Overcome An Aspect Of The Criminal Trial That Substantially Impairs Its Truth Finding Function And So Raises Serious Questions About The Accuracy Of Guilty Verdicts In Past Trials, The New Rule Has Been Given Complete Retroactive Effect.

Petitioners suggest that the question of the retroactive application to be accorded the rule in *Ham* is susceptible to analysis under the three prong test enunciated in *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The test considers:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." See Brief for the Petitioners at 32.[20]

While Respondent agrees that the three prong test of *Stovall, supra,* provides an analytical framework for dealing with problems of retroactivity, it is respectfully suggested that Petitioner misreads the *Stovall* test in affording equal weight to each of the three prongs. A careful examination of this Court's opinion in *Desist v. U.S.*, 394 U.S. 244, 249 (1969) reveals that in applying

[20]It is interesting to note that the case that Petitioners rely upon for setting the standard for "retroactivity" makes no distinction between direct and collateral review. In that case this Court stated: "We also conclude that for these (retroactive) purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review." ID at 300.

the test of *Stovall*, "foremost among these factors is the purpose to be served by the new constitutional rule." In *Williams v. U.S.*, 401 U.S. 646 (1971) (limiting *Chimel v. California*, 395 U.S. 752 (1969) to prospective application only), Mr. Justice White, speaking for this Court, stated:

> "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances."

The purpose of the rule of *Ham*, dealing with the right to a fair and impartial jury, goes as much to the very heart of the fact finding function as any of the other cases of this Court that have been held retroactive, and raises such serious questions about the accuracy of guilty verdicts in past trials as to also require its retroactive application.[21]

[21]See *Argensinger v. Hamlin*, 407 U.S. 25 (1972) (held absent a knowing and intelligent waiver no person may be imprisoned for any offense, felony or misdemeanor without counsel), held retroactive in *Mays v. Harris*, 369 F. Supp. 1348 (W.D.Va. 1973); *White v. Maryland*, 373 U.S. 59 (1963) (excluding evidence of a guilty plea made without counsel) *Hamilton v. Alabama*, 368 U.S. 52 (1961) (right to counsel at arraignment), held retroactive in *Arsenault v. Massachusetts*, 393 U.S. 5 (1968); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy provision of 5th amendment applicable to the states) held retroactive in *Price v. Georgia*, 398 U.S. 323 (1970); *Barber v. Page*, 390 U.S. 719

Indeed, even the Supreme Judicial Court for the Commonwealth of Massachusetts admits that the major

(1968) (absence of a witness from the jurisdiction would not justify the use at trial of preliminary hearing testimony unless the state had made a good faith effort to secure the witness' presence) held retroactive in *Berger v. California*, 393 U.S. 314 (1969); *Burgett v. Texas*, 389 U.S. 109 (1967) (conviction obtained in violation of *Gideon* cannot be used either to support guilt or enhance punishment for another offense) held retroactive in *Gilday v. Scafati*, 428 F.2d 1027 (1st Cir. 1970) cert. den. 400 U.S. 926 (1970); *Douglas v. California*, 372 U.S. 353 (1963) (benefit of counsel on first appeal as of right) held retroactive in *Maness v. Swenson*, 385 F.2d 943 (8th Cir. 1967); *Griffen v. Illinois* 351 U.S. 12 (1956) (state must furnish transcript to indigent on appeal) held retroactive in *Estridge v. Wash. State Bd. of Prison Terms and Parole*, 357 U.S. 214 (1958); *Gideon v. Wainwright*, 372 U.S. 335 (1963) indigent's right to counsel in felony case) held retroactive in *Pickilsimer v. Wainwright*, 375 U.S. 2 (1963); *Turner v. Louisiana*, 379 U.S. 466 (1965) (association between crucial prosecution witness and jury is a violation of due process held retroactive in *Gonzales v. Beto*, 405 U.S. 1052 (1972); *In re Winship*, 397 U.S. 358 (1970) (proof beyond reasonable doubt standard applicable to juvenile proceedings held retroactive in *Ivan V. v. City of N.Y.*, 407 U.S. 203 (1972); *Jackson v. Denno*, 378 U.S. 368 (1964) (submitting voluntariness of confession to jury and instructing them to disregard it if found involuntary, or if found voluntary to weigh it accordingly is unconstitutional) held retroactive in *U.S. ex rel Dickerson v. Rundle*, 363 F.2d 126 (3rd Cir. 1966) cert. den. 386 U.S. 916 (1967); *Klopfer v. N.C.*, 386 U.S. 213 (1967) (right to speedy and public trial applicable to the states) held retroactive in *U.S. es rel Stukes v. Shovlin*, 329 F. Supp. 911, aff'd 464 F.2d 1211 (3rd Cir. 1972); *Loper v. Beto*, 405 U.S. 473 (1972) (use of prior convictions void under *Gideon* for impeachment purposes violates due process; *Mayberry v. Pennsylvania*, 400 U.S. 405 (1971) (direct contempt must be adjudicated instantly or by judge other than one reviled) held retroactive in *Grizell v. Wainwright*, 481 F.2d 405 (5th Cir.

purpose of the *Ham* ruling is to overcome an aspect of the criminal trial that substantially impairs its truth finding function, and they believe that the "limited" rule announced in *Ham* should be given retroactive effect.[22] ''

It is Respondent's assertion that the right to trial by jury will be useless as a safeguard for a criminal defendant if the jury itself is not unbiased.

In this regard, the Supreme Judicial Court for the Commonwealth of Massachusetts has stated:

> "Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the

1973); *Mempa v. Rhay*, 389 U.S. 128 (1967) (counsel required in revocation of probation and imposition of deferred sentencing proceeding) held retroactive in *McConnel v. Rhay*, 393 U.S. 2 (1968); *Bruton v. U.S.*, 391 U.S. 123 (1968) (admission at a joint trial of a defendant extrajudicial confession implicating a co-defendant violates 6th amendment) held retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968); *Waller v. Florida*, 397 U.S. 387 (1970) (barred two prosecutions on double jeopardy grounds based on same offense) held retroactive in *Robinson v. Neil*, 409 U.S. 505 (1973); *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973) (held unconstitutional criminal abortion statutes prohibiting abortions during first trimester except to save life of mother) held retroactive in *U.S.* ex rel *Williams v. Preiser*, 497 F.2d 337 (2nd 1974); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (death sentence may not be carried out if jury was chosen by excluding veniremen who voiced general objections to it).

[22] *Commonwealth v. Lumley*, Mass. Adv. Sh. (1975) 751, 759. Petitioner's Supplemental Brief in Support of Certiorari at 9.

evidence." *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 179 (1911)

And this Court has said:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors. The failure to afford an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey v. Ohio*, 273 U.S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf *Thompson v. City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. . ." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Petitioners suggest that the *Ham* case, being directed toward the function of the jury, *DeStefano v. Woods*, 392 U.S. 631 (1968), as well as *Daniel v. Louisiana*, 420 U.S. 31 (1975), should control the case at bar. (See Brief for Petitioners at 35).

In *Daniel*, it was held that *Taylor v. Louisiana*, 419 U.S. 522 (1975) would not be given retroactive effect. A distinciton can be drawn, however, between the decision in *Taylor* and the decision in *Ham*. *Taylor*, when decided on January 21, 1975, announced a new rule of law, heretofore unstated, that the exclusion of women from jury service denied a defendant's Sixth

and Fourteenth Amendment right to an impartial jury. *Ham*, on the other hand, did not announce a new rule of law but simply clarified the basis for this Court's decision in *Aldridge*. Furthermore, it cannot be said that the absence of women jurors impaired the truth finding function of the jury, whereas the failure to exclude prejudicial jurors would have a significant impact upon the accuracy of jury verdicts.

In *DeStefano, supra*, it was held that *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194, would not be given retroactive effect. A distinction can be drawn between *Duncan* and *Bloom*, and *Ham*. In holding both *Duncan* and *Bloom* to be prospective only, this Court was greatly concerned with the reliance of the states on past decisions of this Court (e.g. *Maxwell v. Dow*, 176 U.S. 581), as well as the effect of retroactivity upon the administration of justice. See *DeStefano, supra*, at 634-635. Unlike *Duncan* and *Bloom*, however, a retroactive application of *Ham* would not upset any good faith reliance on the part of the Commonwealth on any past decision of this Court. The *Ham* principle went to the fairness of the trial. It overruled no line of Supreme Court decisions on which the state might have justifiably relied. To the contrary, it simply applied established case law that the essential demands of fairness requires that prospective jurors be inquired as to racial prejudice, and gave it constitutional underpinnings.

Certainly, the Supreme Judicial Court was aware of this Court's holding in *Aldridge*, as well as the various federal[23] and state[24] court decisions requiring questions

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[23] See cases in note 13, *supra*.

[24] See cases in note 12, *supra*.

to be put to prospective jurors as to racial prejudice. Nevertheless, the Supreme Judicial Court has been consistent in its failure to require that such questions be asked.[25]

Furthermore, Respondent does not agree that the First Circuit's ruling would have a "calamitous" effect on the administration of justice.

To begin, the First Circuit decision does not hold *Ham* to be "fully retroactive", but only to apply to *Ross*, a black criminal defendant. It is certainly premature without further clarification from the First Circuit to extend its decision in *Ross* "to all defendants who are members of a racial minority." (Petition for Writ of Certiorari at 36)

Second, the First Circuit has limited its decision to convictions involving violent crimes. At least, for the moment, convictions not involving violent crimes will not be afforded the same constitutional protection as that outlined in *Ross*.

Third, Respondent asserts that it is implicit in the decision by the First Circuit that its decision only applies to those criminal defendants who had proposed additional questions to the trial judge as to racial prejudice and the trial judge had refused or neglected to ask these questions.[26]

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[25]*Commonwealth v. Ryles*, Mass. Adv. Sh. (1973) 849, cert. den. 414 U.S. 980 (1973); *Commonwealth v. Rodriguez*, Mass. Adv. Sh. (1973) 1181; *Commonwealth v. Bumpus*, Mass. Adv. Sh. (1974) 477; *Commonwealth v. Pinckney*, Mass. Adv. Sh. (1974) 483; *Commonwealth v. Lumley*, Mass. Adv. Sh. (1975) 751. *Commonwealth v. Nassar*, 354 Mass. 249 (1968), *Commonwealth v. Lee*, 324 Mass. 714 (1949).

[26]In those states where the voir dire is conducted by the attorneys themselves, their failure to ask the questions would remove the case from the scope of the First Circuit decision.

Fourth, Respondent also asserts that in the 30 months since *Ham* was decided, many state and federal courts have presumably followed that decision. Therefore, for impact purposes, we need only be concerned with those state and federal proceedings commenced prior to *Ham*.[27] Mr. Justice Douglas, dissenting in *Adams v. Illinois*, 405 U.S. 278, 295 (1972) stated:

> "Inasmuch as the median state sentence served by felons when they are first released is about 20.9 months, most pre-*Coleman* sentences would now be served and as a practical matter these former prisoners would not seek judicial review."

Similarly, if *Ham* is given retroactive effect, many felons will have already completed their sentences.[28]

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[27]The Supreme Judicial Court has recently stated that:

> "As a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, we believe that the trial judge should grant the motion. Our information indicates that since the *Ham* decision, such motions are being granted routinely in the Superior Court."

See *Commonwealth v. Lumley*, (Petitioner's Supplemental Brief for Certiorari at 6).

[28]According to the Massachusetts State Department of Corrections, the medium length of incarceration for felons at Walpole 1973-1974 (maximum security facility) was 28 months. The breakdown on specific crimes was:

manslaughter	–	36 months
armed robbery	–	38 months
unarmed robbery	–	31 months
other person	–	27 months
sex	–	40 months
arson-burglary	–	21 months
other property	–	21 months
narcotics	–	21 months
other	–	24 months

Fifth, Massachusetts General Laws, Chapter 234, §228, has itself been amended twice since the *Ham* decision. The most recent amendment, effective as of July 13, 1975, now requires the judge to question jurors who may have prejudices, providing in part that whenever it appears that a juror may not stand indifferent because of community attitudes, publicity, or "possible preconceived opinions towards the credibility of certain classes of persons", the court "shall" question that juror. (See Chapter 335 of the Acts of 1975)

Sixth, although both the Commonwealth and the Supreme Judicial Court urge upon this Court that retroactive application of *Ham* would have a calamitous impact on the administration of justice in Massachusetts, they are uncertain as to the number of defendants who would be affected.[29] Respondent asserts that although some black criminal defendants would certainly fall within the *Ross* decision, the effect on the administration of justice would neither be "calamitous" nor have a substantial impact thereupon.[30]

The view of the Commonwealth reflects the value judgment that the necessary administrative burden may not make it worth granting the benefits of the new rule to those convicted prior to its promulgation.

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[29]See *Commonwealth v. Lumley*, Mass. Adv. Sh. (1975) 751, Petitioner's Supplemental Brief in Support of Certiorari at 10.

[30]I have recently inquired of two (2) Justices of the Supreme Judicial Court and the Chief Justice of the Superior Court as to the number of defendants affected by the *Ross* decision. Their best estimates were that approximately 15 defendants would be so affected.

Respondent suggests that the priority of constitutional rights are the first magnitude.

> "It is difficult to see why prisoners have less of a right to be on these (crowded) dockets than the divorce and tort claimants who largely account for the present delay in the courts. The sense of injustice which compels retroactive application of the new rule in favor of convicted prisoners ought not be defeated merely by a fear of overworking the judiciary." See *Note, Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 950 (1962).

C. For Retroactivity Purposes, No Distinction Is Justified Between Convictions That Are Final, And Convictions At Various Stages Of Trial And Direct Review.

Petitioners submit that the First Circuit's retroactive application of *Ham* "should be limited to those cases still pending upon direct review and not extended to those cases in which judgment has become final." (See Brief for Petitioners at 38.) In fact, *Ross* was still pending on a writ of certiorari at the time of the *Ham* decision and, therefore, the judgment of the state court had not become final before the promulgation of the *Ham* rule. Respondent submits, however, that even though *Ross* is now on "collateral attack" via federal habeas corpus, such a distinction between "collateral attack" and "direct review" as is drawn by Petitioners is arbitrary and unreasonable, finding a lack of support in both law and logic. See *Williams v. U.S.*, 401 U.S.

646 (1971), *Stovall v. Denno*, 388 U.S. 293.[31]

Petitioner also suggests that application of a new procedural due process rule to judgments which have become final and are attacked collaterally upon a writ of habeas corpus violates a valid state interest in the "finality" of judgment. (See Brief for Petitioners at 7.)[32] Indeed, it could be argued that any state interest in the "finality" of judgment may be outweighed by the likelihood that continued and frequent consideration of constitutional claims will strengthen our moral

[31] Two simple hypotheticals can illustrate the arbitrariness of Petitioner's distinction.

a) X and Y are indicted together for the murder of Z. Y's attorney moves for a severence, which is granted. X's trial and appeals proceed to a conclusion, while Y's trial is delayed and still on direct review at the time a new case comes down affecting the rights of both X and Y. Under Petitioner's distinction, Y would now have the benefit of the new rule, whereas X, whose only remedy would now be via "collateral attack" would not have the benefit of the new rule even though X and Y both were charged with the same crime, against the same person, at the same time.

b) X and Y are both indicted on the same day for similar offenses in different states. In X's state, the court dockets are relatively empty so that X's trial and appeals proceed to a swift and final conclusion. In Y's state, the court dockets are crowded so that at the time of a new decision affecting both X and Y, Y is still on direct review. Under Petitioner's distinction only Y would have the benefit of the new rule even though both crimes were committed on the same date.

[32] According to the Massachusetts Department of Corrections the yearly cost to support an incarcerated individual in 1973-1974 at Walpole was $11,320. Therefore, Respondent submits that for so long as a person is kept in prison, the matter is "final" neither for him, nor for the society that supports him in that prison.

and intellectual resources in that it will make the public and bar more sensitive to due process considerations. See Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U.Chi. LR 719 (1966).

In support of its position that:

> "principles of comity and federalism and the very nature of the "Great Writ" itself, must be considered in determining whether a new rule is to be applied retroactively to a state court conviction attacked collaterally," (See Brief for Petitioners at 39)

Petitioners quote from *Kaufman v. U.S.*, 394 U.S. 217, 232 (1969) (Black, J., dissenting) that:

> "not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or Subsection 2255 proceedings after a conviction has become final."

Yet, the majority opinion in that case, holding a claim of unconstitutional search and seizure cognizable in such a proceeding stated at 228:

> "The approach adopted by the Court in *Thornton* and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. In *Fay v. Noia*, a case involving a state prisoner who claimed that his conviction was coerced, we said that 'conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

In *Brown v. Allen*, 344 U.S. 443 (1953) (opinion of Frankfurter, J.) it was stated:

> "The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized . . . It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments."

Respondent further submits that the issue of "retroactivity" when brought before the Court in a habeas corpus proceedings is largely illusory, i.e., the writ is available to state prisoners who are "in custody in violation of the Constitution" (28 USC subsection 2241(3)(c)) In acting on the Great Writ a Federal Court must determine whether a petitioning prisoner is "presently" detained in violation of the Constitution.

In passing on the legality of the prisoner's present detention, the legality of past detention is not the subject of the inquiry, and the Court sits as it always does under the Constitution as presently construed. There is a current controversy between the litigants to which the current law is to be applied in the judicial process. See Meador, *Habeas Corpus, the Retroactivity Illusion*, 50 Va. L. Rev. 1115 (1964). Therefore, since *Ham* is the current state of the law, it should be applied to *Ross*, thereby obviating the issue of *Ham's* retroactive application.

Finally, Respondent asserts that for this Court to adopt prospective overruling would be to discourage the

bringing of new ideas to appellate courts for fear that the litigants will be arguing the case for others and not themselves. See *Moliter v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11 (1959) cert. den. 362 U.S. 968 (1960). Therefore, to declare in the *Ham* case a basic constitutional protection, and then to withhold the benefit of the rule for future application only, would do little to enhance the image of justice, and would do little for Ross, who has struggled for over four years and six appellate hearings to obtain a new trial.

IV.

EVEN IF *HAM V. SOUTH CAROLINA*, 409 U.S. 524 (1973) DID NOT ENUNCIATE A NEW CONSTITUTIONAL RULE OF UNIVERSAL APPLICABILITY, THIS COURT SHOULD NOW ANNOUNCE SUCH A RULE IN *ROSS*.

Respondent suggests that if the interpretation accorded *Ham* by the Petitioners is correct, i.e., even if *Ham* did not enunciate a new constitutional rule of universal applicability, this Court, for all the foregoing reasons, should now declare such a rule in *Ross*.

CONCLUSION

From the foregoing, it is clear that the United States Court of Appeals for the First Circuit did not err in affirming a decision of the United States District Court for the District of Massachusetts granting Respondent's

Petition for Writ of Habeas Corpus based upon the failure of the trial judge to inquire of the prospective jurors specifically as to racial prejudice.

Respondent urges this Court to affirm. As was stated in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (Douglas J., dissenting):

> "Our federal district courts and Courts of Appeals are much closer to law administration in the respective states than we are in Washington, D.C. They are responsible federal judges who know the Federal Constitution as well as we do ... When a Court of Appeals honors the Constitution by granting the Great Writ or in its solemn judgment denies it, we should let the matter rest there, save for manifest error.

Failure of this Court to affirm the decision of the First Circuit Court of Appeals:

> "is to see (the) decision in *Ham v. South Carolina* stillborn and to write an epitaph for those 'essential demands of fairness' recognized by this Court 40 years ago in *Aldridge*. I fear that we 'bring the processes of justice into disrepute' not only by sanctioning the denial of a right required by 'essential demands of fairness' but also in failure to compel compliance by the court below

(Supreme Judicial Court for the Commonwealth of Massachusetts) with a precedent of this Court. . ." (App. 137-142 AT 142)

Respectfully submitted,[33]

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[33]Counsel acknowledges the assistance of Lawrence E. Besser of the University of Miami School of Law in the preparation of this Brief and appreciates his hard work on behalf of Respondent.